In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1240

TOMAS RODRIGUEZ AND ANGEL MANUEL SANTANA, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 529 F. 2d 530.

JURISDICTION

The judgment of the court of appeals was entered on January 22, 1976. A petition for rehearing with suggestion for rehearing *en banc* was denied on February 23, 1976 (Pet. App. B). The petition for a writ of certiorari was filed on March 2, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether under the circumstances of this case the court erred in denying petitioners' motions to withdraw their guilty pleas.

STATEMENT

Petitioners both pleaded guilty in the United States District Court for the Northern District of Illinois to a charge of having distributed heroin, in violation of 21 U.S.C. 841(a)(1). As set forth in the opinion of the court of appeals (Pet. App. 2-4), petitioners' guilty pleas were the result of extensive plea bargaining. At the hearing held pursuant to Fed. R. Crim. P. 11, the district court questioned petitioners extensively concerning their decision to plead guilty and the underlying factual basis for the pleas, thoroughly explained to petitioners their constitutional rights, advised them that the court was not bound by the plea bargain, warned them of the maximum penalty that could be assessed, and advised them that the court would not pronounce sentence until it had considered presentence reports. Petitioners then admitted committing the offense charged and personally entered pleas of guilty. The district court accepted the pleas.

On the date set for sentencing, the court observed that statements petitioners had made to probation officers for the purpose of their presentence reports (Pet. App. D and E) raised a possibility of entrapment. The court indicated that to it the statements implied that petitioners were new in the narcotics business and that they had been directed to the source of the heroin by Angel Mario Torres, the government informer to whom petitioners had made the sale (Tr. 121-123). Although the court said it did not necessarily believe the statements (see Pet. 5), it postponed sentencing (with the consent of all parties) in order to clarify the matter and to resolve the court's questions.

The government subsequently informed the court that the individual who had supplied the heroin to petitioners had died and that Torres was in Puerto Rico. Petitioners

filed a motion to have Torres produced and indicated that they would move to withdraw their pleas if the government was unable to produce him. A material witness warrant for Torres was issued, and he was returned under tight security for the hearing (Pet. App. 3).

At the hearing, petitioners, Torres, and Agent Mann of the Drug Enforcement Administration testified concerning the circumstances of the heroin transaction. Torres and the petitioners were examined by the government, counsel for petitioners and the court. After the hearing, petitioners each moved to withdraw his guilty plea.

The district judge denied the motions, indicating that the hearing had satisfied him that there was "nothing to" his earlier questions regarding entrapment (Pet. 6). Petitioner Santana was sentenced to two years' imprisonment and petitioner Rodriguez to imprisonment for a year and a day, each sentence to be followed by a three-year special parole term (Pet. App. 4).[1] The court of appeals affirmed (Pet. App. A).

ARGUMENT

Petitioners contend that the district court erred in refusing to grant their motions to withdraw their guilty pleas. In *Kercheval* v. *United States*, 274 U.S. 220, 224, this Court indicated that prior to sentencing a trial court "in exercise of its discretion" will permit the withdrawal of a guilty plea "if for any reason the granting of the privilege seems fair and just." Under this standard, courts of appeals, while holding that presentence motions to withdraw guilty pleas should be viewed liberally, *e.g.*, *Kirshberger* v. *United States*, 392 F. 2d 782, 784 (C.A. 5),

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[1]The sentence recommended by the government as a result of the plea bargain was two years' imprisonment with the mandatory three-year parole term (Pet. App. 4).

correctly have refused to afford defendants an absolute right to withdraw a guilty plea prior to sentencing, *e.g.*, *United States* v. *Presley*, 478 F. 2d 163, 166 (C.A. 5); *United States* v. *Webster*, 468 F. 2d 769, 771 (C.A. 9), certiorari denied, 410 U.S. 934; *United States* v. *Stayton*, 408 F. 2d 559, 561 (C.A. 3). Instead, the matter is left to the sound judgment of the trial court, whose determination is reversible only for abuse of discretion. *E.g.*, *United States* v. *Barker*, 514 F. 2d 208, 219 (C.A. D.C.), certiorari denied, 421 U.S. 1013; *United States* v. *Vallejo*, 476 F. 2d 667, 669 (C.A. 3); *United States* v. *Lombardozzi*, 436 F. 2d 878, 881 (C.A. 2), certiorari denied, 402 U.S. 908.

There was no abuse of discretion here. The trial judge displayed an abundance of caution in calling *sua sponte* for an explanation of petitioners' unsworn statements contained in the presentence reports.[2] At the hearing, the judge's doubts were completely resolved, and he concluded correctly that there was "nothing to" his initial concerns. Under these circumstances, there was no "fair and just" reason warranting the withdrawal of petitioners' guilty pleas.[3] See *United States* v.

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[2]We submit that the statement did not in fact give the trial court a basis to be concerned about the possibility of entrapment. As this Court has said, the entrapment defense "focus[es] on the intent or predisposition of the defendant to commit the crime," *United States* v. *Russell*, 411 U.S. 423, 429, rather than upon the conduct of the government's agents. See *Hampton* v. *United States*, decided April 27, 1976 (No. 74-5822). Petitioners' statements in their presentence reports contained nothing to support an inference that there was not the intent or predisposition to commit the crime for which petitioners had pleaded guilty. See *Sorrells* v. *United States*, 287 U.S. 435; *Sherman* v. *United States*, 356 U.S. 369.

[3]Indeed, in the circumstances of this case, the fact that one of the parties to the criminal transaction had died, and the prosecution's case might to some extent have been prejudiced thereby, would be further reason not to allow withdrawal of the pleas.

Barker, *supra*, 514 F. 2d at 218-222.[4] The court of appeals correctly so held, stating (Pet. App. 6):

> Based upon our independent review of the record as a whole, certain things have become clear to us. The [petitioners'] guilty pleas were made in full accord with all of the requirements of Fed. R. Crim. P. 11. The district court properly accepted the pleas. Only after a lingering doubt as to a possible defense of entrapment did the trial court wisely and compassionately postpone sentencing until such doubts had been resolved. [Petitioners] were given every opportunity to, and did, participate fully in the proceedings held for that purpose. In our considered judgment Judge Will correctly and fairly resolved the question of entrapment adversely to [petitioners]. He reiterated that the determination of the entrapment question was the sole purpose of the extended hearings. Having resolved that question, the judge then quite properly found in substance that there was no good reason at all why the motions to withdraw the guilty pleas should not be denied. It was an exercise of sound discretion on his part.

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[4]Petitioners' claim (Pet. 11-13) of a conflict among the circuits does not withstand scrutiny. The courts wisely have eschewed *per se* rules in this area, and instead determine each case on its particular facts. The different results reached by courts in certain cases merely reflect this particularized analysis. Thus, in *United States* v. *Presley*, *supra*, cited by petitioners (Pet. 12-13), an intervening decision of this Court afforded a possible defense which had not been available when the plea was first entered. In *Gearhart* v. *United States*, 272 F. 2d 499 (C.A. D.C.) (cited at Pet. 13), in addition to applying an incorrect standard (see 272 F. 2d at 502), the district court had essentially refused to consider defendant's nonfrivolous claim of mental incompetence. See also *United States* v. *Stayton*, *supra* (district court applied the wrong standard).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MAY 1976.

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